

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

HENRY COLTEN; ISLA RUTH)	
WALKER; and JOHNNY COLTEN,)	
)	
Plaintiffs,)	
)	
vs.)	No. CIV-04-1678-C
)	
STATE OF OKLAHOMA, EX REL.)	
RICHARD SMOTHERMAN, District)	
Attorney for the Twenty-Third Judicial)	
District; THE BOARD OF COUNTY)	
COMMISSIONERS of Lincoln County,)	
State of Oklahoma; THOMAS)	
MCNELLY, Sheriff of Lincoln County,)	
Oklahoma; Deputy WELLS; Deputy)	
BUTLER, and JOHN DOE(s),)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendants Board of County Commissioners of Lincoln County, Thomas D. McNelly, Deputy Wells and Deputy Butler's Motion to Strike Plaintiffs' Amended Complaint and Defendant State of Oklahoma, ex rel. Richard Smotherman's Motion to Strike Plaintiffs' Amended Complaint. Plaintiffs filed a Response to each and these matters are now at issue.

Defendants in their motions complain that Plaintiffs' Amended Complaint should be stricken as untimely. Defendants note that the Scheduling Order required any amendment to be filed by April 1, 2005, and the Court's April 27, 2005, Order required any amendment

to be filed by May 12, 2005; therefore, Plaintiffs' amendment filed June 10, 2005, was substantially out of time. Defendants also complain that in the Amended Complaint Plaintiffs substitute Defendant McNelly for John Doe and thereby effectively add new claims.

Although the Court finds little merit to Plaintiffs' excuses for failing to timely file the Amended Complaint, Defendants have failed to demonstrate incurable prejudice from the delay. To the extent that discovery affected by the amendment has been completed, the parties have adequate time remaining under the Scheduling Order to complete it. To the extent the amendment requires discovery beyond the amounts contemplated by Fed. R. Civ. P. 26, 30, 33 or 36, Defendants may seek relief from the Court. Defendants' argument that the substitution of Sheriff McNelly for John Doe adds additional claims is without merit. The allegations in the Amended Complaint are the same as those in the original state court Petition with the only change being the substitution. Moreover, Sheriff McNelly has always been identified in the caption as a Defendant. Thus, there should be no surprise regarding the allegations against him. However, to the extent that Plaintiffs have offered discovery responses suggesting someone else was John Doe or otherwise contradicting the current claims against Sheriff McNelly, Defendants may bring this fact to the attention of the Court.

As set forth more fully herein, Defendants Board of County Commissioners of Lincoln County, Thomas D. McNelly, Deputy Wells and Deputy Butler's Motion to Strike Plaintiffs' Amended Complaint (Dkt. No. 37) is DENIED. Defendant State of Oklahoma,

ex rel. Richard Smotherman's Motion to Strike Plaintiffs' Amended Complaint (Dkt. No. 38)
is DENIED.

IT IS SO ORDERED this 5th day of July, 2005.



ROBIN J. CAUTHRON
United States District Judge